STATE OF QUEENSLAND

v.

D.R. MURPHY & ANOR.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, GAUDRON, MCHUGH JJ
[F.C. 90/039]
3 OCTOBER 1990

LAND LAW: *Zoning - Compensation - Development - Potential - Proof of bad faith - Impact on environment - Meaning of environment - Acquisition of Land Act 1967 [Aust] - Land Act 1962 (Q) [Aust] - Local Government Act 1936 (Q) [Aust], ss. 32A, 33 (6A)*

The respondent's land was acquired in August 1983, under the Acquisition of Land Act 1967 of Queensland for the purpose of an environmental park. Prior to this, the land was zoned as rural land. An application to develop the land into a residential zone was submitted in 1981 but was rejected by the relevant authority on the grounds, *inter alia*, that it would be detrimental to the Mon Repos Turtle Rookery (the said rookery) in the area.

The Land Court of Queensland awarded A$520,000 as compensation to the respondent. On appeal by the appellant, the amount was reduced to A$170,000 on the ground that the land value should be determined on the basis of its rural zoning. The respondent appealed to the Supreme Court of Queensland under s. 45 of the Land Act 1962 Queensland, which allowed an appeal on the grounds of error or mistake in law or want or excess of jurisdiction. The Supreme Court, allowing the respondent's appeal, held that the respondent was entitled to have compensation assessed on the basis that the prospect of rezoning should be considered free, not only of the pressures of the National Parks and Wildlife Services or the local authority, but without regard for the possible impact of a subdivision which might follow upon the rezoning upon the turtle population. The case was remitted to the Land Appeal Court for reconsideration. The appellant appealed to the High Court against the decision of the Supreme Court.

Held:

[1] A resuming authority should not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption on the basis that the destroyed potential never existed.

[2] A characteristic or attribute of the land which affects its value must be taken into account in assessing compensation. The Land Appeal Court considered the existence of the said rookery as an attribute of the land which affected its value, since this militated against the rezoning.

[3] Mere rezoning of land would not occasion any deleterious impact on the environment. The impact, if any, would be occasioned only by some different use or development of the land as would be permitted if the land were rezoned.

[4] (a) The word "environment" signifies that which surrounds and has long been understood to include the conditions under which any person or thing lives;

(b) taking its narrowest possible meaning and applying it to the instant case, the rezoned land was and is environed by land which turtles used and continue to use as a rookery. Any use of the land which adversely affects the number of the turtle population using the adjoining coastal strip would effect an alteration of the environment of the resumed land;

(c) any reduction in the number of turtles might properly be thought to constitute a deleterious impact on the environment of the resumed land.

[5] Since the land was zoned rural at the time of resumption, it was for the respondent to show that there was some chance that a compromise proposal might have resulted in the lifting of the restrictions flowing from the rural zoning. To do this, some material or evidence must be furnished of some proposal which might have met with approval. The Land Appeal Court had considered the prospect of such compromise proposal by reference to the evidence before it and it was not required to do more. Therefore, there was no error of law on its part in accepting, in the absence of the adoption of the procedures contemplated by s. 32A of the Local Government Act, that there would inevitably have been a refusal of rezoning.

[6] There was no evidence to support the respondent's contention that the land had a prospect of being rezoned a tourist resort or that it should have been valued at A$1 million.

[Appeal allowed.]

Cases referred to:
Strathpine Developments Pty. Ltd. v. Pine Rivers Shire Council [1974] Qd R 374 ***(cit)***
Corrie v. MacDermott [1914] AC 1056 ***(cit)***
Housing Commission of N.S.W. v. San Sebastian Pty. Ltd. [1978] 140 CLR 196 ***(cit)***
Melwood Units Ltd. v. Main Roads Cmr [1979] AC 426 ***(cit)***
Pointe Gourde Quarrying & Transport Co. Ltd. v. Sub-Intendent of Crown Lands [1947] AC 565 ***(cit)***
Royal Sydney Gold Club v. Federal Commissioner of Taxation [1957] 97 CLR 379 ***(cit)***
Rugby Water Board v. Shaw-Fox [1973] AC 202 ***(cit)***

Legislation referred to:
Land Act 1962 (Queensland) [Aust], s. 45
Local Government Act 1936 (Queensland) [Aust], ss. 32A(1), (2), (4), (5), 33(6A)(e)(v)(B)

Other sources referred to:
Oxford English Dictionary, 2nd Edn. [1989]
The Encyclopedia of Word & Phrase Origins [1987]

For the appellant - K.M. O'Shea, Crown Solicitor for the State of Queensland
For the respondents: Flower & Hart

JUDGMENT

Mason CJ, Brennan, Deane, Gaudron, McHugh JJ:

D.R. Murphy and Cove House Australia Pty. Ltd. (the respondents) were the owners of 12.83 ha. of land at Mon Repos Beach near Bundaberg which was, on 27 August 1983, resumed pursuant to the Acquisition of Land Act 1967 (Q.) for the purposes of an Environmental Park. Mon Repos Beach is the site of a world-renowned turtle rookery.

Prior to its resumption the land was, and since 1976 had been, zoned "Rural" under the Woongarra Shire Council Town Planning Scheme. Subdivision was restricted by that zoning to allotments with a minimum area of 8 ha. An application to have the land rezoned as "Residential A", which would permit the subdivision of the land into 40 allotments, met with a number of objections and was refused by the Woonsgarra Shire Council (the Council) in 1981.

The grounds given by the Council for refusal of the rezoning application were:

(1) The detrimental effect that the proposed development would have on the Mon Repos Turtle Rookery which is a tourist attraction of worldwide significance and is the principal breeding ground for sea turtles in mainland Eastern Australia.

(2) The proposed residential development would have an effect on the Turtle Rookery caused by artificial lighting and the predatory effects of household pets such as dogs and cats.

(3) The Turtle Rookery should be preserved for scientific research and for the educational value of the general public as the Rookery is the most accessible in Eastern Australia and the effect of the proposed development would deprive people of this facility.

(4) The Council considers that the development in this location is premature as sewerage is not available.

It is necessary to mention an objection received by the Council from the National Parks and Wildlife Service. In support of that objection submissions were made to the Council as to the significance of the rookery. It was also put that subdivision of the land would effectively render the land unavailable for acquisition for nature conservation purposes. Some time later, the Council wrote to the National Parks and Wildlife Service seeking assistance in resisting an appeal from the refusal of the application for rezoning and stating that "Council is in this case protecting the interests of the State Government Departments". The land was resumed before the appeal was determined.

After the resumption of their land the respondents brought proceedings for the assessment of compensation in the Land Court of Queensland. Compensation was assessed at $520,000 on the basis of a national rezoning as Residential A and subdivision into 40 allotments. The appellant successfully appealed to the Land Appeal Court. The Land Appeal Court held that the land value should be determined on the basis of its rural zoning and held that a "prudent purchaser would not add anything over and above the land's homesite value in expectation of a more liberal approach to rezoning or subdivision at some future date". Compensation was assessed in the sum of $170,000.

The respondents appealed from the decision of the Land Appeal Court to the Full Court of the Supreme Court of Queensland pursuant to s. 45 of the Land Act 1962 (Q.) which allows an appeal on the grounds of error or mistake in law or want or excess of jurisdiction. It was held by majority (Connolly and McPherson JJ, Williams J. dissenting) that the respondents were entitled to have compensation assessed on the basis that the prospect of rezoning should be considered

> free, not only of the pressures of the National Parks and Wildlife Service on the local authority, but without regard for the possible impact of a subdivision which might follow upon the rezoning upon the turtle population.

On the basis that the Land Appeal Court erred in law by considering one or both of these matters, the appeal was allowed and the matter remitted to that latter Court for reconsideration. The present appeal is brought from that decision and order.

In this Court the respondents seek to uphold the order of the Full Court on the grounds relied upon by that Court or, alternatively, on other grounds included in a notice of contention which repeats the substance of a number of grounds of appeal filed in the Full Court but not dealt with in the majority judgment. Many of the matters raised in the notice of contention would appear to travel beyond the matters which might properly be made a ground of appeal under s. 45 of the Land Act. Presumably in recognition of this, Counsel for the respondents limited the argument to submissions that the Land Appeal Court erred by failing to give any account to "the uncontradicted assessment of value by Mr.. Weigh; ... accepting in the absence of the adoption of the procedures contemplated by s. 32A of (the Local Government Act 1936 (Q.) (the Act)) that there would inevitably have been a refusal of rezoning; and ... adopting an erroneous and extended meaning of the word 'environment'". The last matter refers to the holding by the majority in the Full Court that the respondents were entitled to have the value of their land assessed "without regard for the possible impact of a subdivision which might follow upon the rezoning upon the turtle population".

It is necessary to explain the above-mentioned reference in the majority judgment of the Full Court to "the pressures of the National Parks and Wildlife Service on the local authority". That is a reference to the submission made to the Council by the National Parks and Wildlife Service that a subdivision of the land in question would effectively render the land unavailable for acquisition by the government and to the Council's subsequent statement that, in refusing the application for the rezoning of the land, it was "protecting the interests of the State Government Departments." From these matters the inference was drawn by the majority in the Full Court that "(t) he resuming authority ... influenced (the council) not to agree to the rezoning". It was then said, by reference to *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands* [1947] AC 565, at p. 572, and *Housing Commission of N.S.W. v. San Sebastian Pty. Ltd.* [1978] 140 CLR 196, at p. 206, that "restrictions on land use ... maintained as a result of consultation with the resuming authority" must be ignored for the purpose of assessing the value of resumed land. See also *Rugby Water Board v. Shaw-Fox* [1973] AC 202, at p. 241. Thus, in the view of the majority, it was necessary to ask:

> whether ..., quite apart from the resumption and the representations of the National Parks and Wildlife Service, the application for rezoning would have been refused.

The statement of principle by the majority in the Full Court and the statement of the necessary consequential enquiry are unexceptionable. One purpose of this principle is to ensure that a resuming authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption on the basis that the destroyed potential had never existed: *Melwood Units Ltd.v. Main Roads Cmr* [1979] AC 426, at p. 434. The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption: *Housing Commission of N.S.W. v. San Sebastian Pty. Ltd.*, at pp. 206-207.

Of course, a characteristic or attribute of the land which affects its value must be taken into account in the assessment of compensation even if the planning restriction, which is a step in the process of resumption, is dependent upon or directed to that characteristic or attribute. The Land Appeal Court considered that the existence of the turtle rookery adjacent to the land was an attribute of the land which affected its value to the extent that the existence of the rookery itself militated against the rezoning. Contrary to the view of the majority of the

Full Court that there was an "open question" on this point, the Land Appeal Court did consider whether the local authority would have refused the rezoning of the land, quite apart from the resumption and the scheme for the protection of the turtles. So much is clear from that Court's statement that:

> We cannot fail to look at the position that, had there never been a scheme of positive action of which the resumption was an integral part, the position would have been that the land would have already had a rural zoning and any proposed developer would have been faced with a Council which would have been strongly and reasonably opposed to any rezoning which may have affected the rookery.

Accordingly, the Land Appeal Court did not fail to consider the prospect of rezoning "free ... of the pressures of the National Parks and Wildlife Service on the local authority".

It is convenient at this stage to note a related submission made on behalf of the respondents in this Court. It was put that, in view of the Council's statement that it was protecting the interests of the State Government Departments, "the Council decision (to refuse the rezoning application) must have been vitiated by bad faith". Even if that had been established, the success of the respondents' claim to have compensation assessed on some basis other than on the basis of restrictions applying by reason of the rural zoning depended on there being some "chance of such restrictions being discharged": *Corrie v. MacDermott* [1914] AC 1056, at pp. 1063-1064. See also *Royal Sydney Golf Club v. Federal Commissioner of Taxation* [1957] 97 CLR 379, at p. 391, where it was said that the proper course was "to inquire first what was the value of the land on the footing that there was no possibility of its ever being turned to other than (presently permitted) purposes, and then how much extra should be allowed for such chance as there was of securing permission for (other) use at some future time". The question of the chance of rezoning in the present case is concluded against the respondents by the finding of the Land Appeal Court that:

> (t) he probabilities against rezoning approval are of such order that ... the prudent purchaser would not add anything over and above the land's homesite value in expectation of a more liberal approach to rezoning or subdivision at some future date

unless that finding is vitiated by an error of law by reason of one or other of the matters advanced on behalf of the respondents.

It is convenient to consider first the submission that the Land Appeal Court adopted an erroneous and extended meaning of the world "environment". By s. 32A(1) of the Act a local authority (which includes the Council) is required:

> when considering an application for its approval ... (to) take into consideration whether any deleterious effect on the environment would be occasioned by the implementation of the proposal, the subject of the application.

By s. 33(6A)(e) of the Act a local authority is required, when considering an application for rezoning,

> amongst other things, (to) take into consideration:
>
> (v) whether, having regard to the permitted uses with or without the consent of the Local Authority of land in the zone in which the land is proposed to be included and the potential for subdivision if the land is included in the zone in which it is proposed to be included:
>
> (B) the provisions of s. 32A of this Act should be applied.

The precise relationship between s. 33(6A)(e)(v)(B) and s. 32A(1) of the Act was not fully explored in argument. However, it was submitted on behalf of the respondents that s. 33(6A)(e)(v)(B) enables a local authority to disregard the mandatory direction contained in s. 32A(1) of the Act. The position is more accurately stated by saying that s. 33(6A)(e)(v)(B) enables a local authority, if it so decides, to apply the provisions of s. 32A when considering an application for rezoning. Section 32A(1) is directed to the deleterious impact on the environment that "would be occasioned by the implementation of (a) proposal". Of course, mere rezoning of land would not occasion any deleterious impact on the environment. The impact, if any, would be occasioned only by some different use or development of the land as would be permitted if the land were rezoned. In the case of an application for rezoning, s. 33(6A)(e)(v)(B) requires a local authority to look beyond the rezoning to "the permitted uses" and "the potential for subdivision" if the land is rezoned. It then enables a local authority to apply the provisions of s. 32A to a rezoning application on the basis of those uses and the potential for subdivision. *cf. Strathpine Developments Pty. Ltd. v. Pine Rivers Shire Council* [1974] Qd R. 374, which was decided before s. 33(6A)(e) was amended by the Local Government Act Amendment Act 1975 (Q.) by the insertion of sub-para. (iv)(B) which corresponded, in substance, with the present provisions of sub-para. (v)(B).

It should also be noted that s. 33(6A)(e) does not confine a local authority to a consideration of the matters therein specified. Thus, even if, as found by the majority in the Full Court, the "impact ... upon the turtle population" is a matter of "the well-being of a particular species" rather than a matter pertaining to the environment, it would not follow that it should have been disregarded by the Council when considering the application for rezoning or must be disregarded in the process of determining whether there was a prospect of rezoning.

In reaching the view that the prospect of rezoning should have been considered "without regard for the possible impact of a subdivision ... upon the turtle population", the majority in the Full Court seemingly construed "environment" in s. 32A(1) of the Act so as to exclude live fauna. The word "environment" was not defined in the Act at the time of the Full Court decision. Nor was there anything in the Act to suggest that it should be construed as having other than its ordinary meaning. The Act has since been amended and now defines "environment" to include "land, air, water and fauna and flora and their habitats above and below the surface of the earth". Counsel for the respondents sought to attach some significance to this amendment, submitting that it indicated that the legislature took the word to have the meaning given to it in the majority judgment of the Full Court. Given that the amendment defines "environment" to include land, air and water and that, if it is to have any meaning at all, it must refer to those matters, it is not permissible to speculate that the amendment evidences an earlier legislative intent that "environment" was used to convey, prior to the amendment, something less than is conveyed by its ordinary meaning. Indeed, one might just as well speculate that the amendment indicates a legislative view that an earlier legislative intent had been frustrated by the decision of the majority of the Full Court.

In its ordinary meaning "environment" signifies that which surrounds and has long been understood to include "the conditions under which any person or thing lives": *Oxford English Dictionary*, 2nd Edn. (1989). The latter usage dates from 1827 when Thomas Carlyle used the word to mean "the aggregate of external circumstances, conditions, and things that affect the existence and development of an individual, organism, or group". See Hendrickson, *The Encyclopedia of Word and Phrase Origins*, (1987).

What constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or affected. The reference point for the purposes of ss. 32A(1) and 33(6A)(e)(v)(B) of the Act is the land which is the subject of an application to which those provisions apply. In the present case it is the land which was the subject of the application for rezoning and which was later resumed. That land was and is surrounded by other land, including a narrow strip of land fronting the sea. During their nesting season turtles resort to that coastal strip and, perhaps also, to adjacent coastal dune areas to lay their eggs. When the eggs are hatched, hatchlings, or the survivors of them, journey from the coastal strip to the sea.

Even taking the narrowest possible meaning of the word "environment" and confining it to the immediately adjacent land, the resumed land was and is environed by land which turtles used and continue to use as a rookery. Any use of the resumed land which, directly or indirectly, reduced the number of turtles using the adjoining coastal strip as a rookery or the number of surviving hatchlings would effect an alteration of a feature of that coastal strip and, hence, an alteration of the environment of the resumed land. And, because the presence of turtles during their nesting and hatching seasons might be thought to be a desirable feature of that coastal strip - and the evidence is that a significant number of objectors and the council considered it so - any reduction in the number of turtles using that land as their rookery or in the number of surviving hatchlings might properly be thought to constitute a deleterious impact on the environment of the resumed land.

Because s. 33(6A)(e)(v)(B) of the Act allows a local authority, when considering a rezoning application, to take into account the deleterious impact of a potential subdivision on the environment and because any reduction in the number of turtles using the rookery or in the number of surviving hatchlings might properly be thought to constitute a deleterious impact on the environment of the resumed land, it was open to the Land Appeal Court to consider, when assessing the prospect of rezoning, "the possible impact of a subdivision which might follow upon the rezoning upon the turtle population". The Full Court erred in holding otherwise.

The argument that the Land Appeal Court erred by "accepting in the absence of the adoption of the procedures contemplated by s. 32A of (the Act) that there would inevitably have been a refusal of rezoning" was made by reference to the provisions of s. 32A(2), (4) and (5). By s. 32A(2) a local authority may adopt a

> policy statement prescribing that an application for its approval, consent, permission or authority for the implementation of a proposal of a type specified in such policy statement shall be accompanied by an environmental impact study report and statement of impact and the matters and things which shall be dealt with in such report and statement.

Section 32A(4) provides that, where a policy statement has been adopted, an environmental impact study report and statement of impact shall accompany any application in respect of a proposal to which the policy statement applies. Section 32A(5) enables a local authority to require an environmental impact study report and statement of impact even though no policy statement has been adopted.

It was submitted on behalf of the respondents that, in determining whether there was a prospect of the land being rezoned, the Land Appeal Court should have taken into account the possibility that a compromise proposal accompanied by an environmental impact study report and a statement of impact might have been approved by the Council.

Because the land was zoned rural at the time of its resumption, it was for the respondents to show that there was some chance that a compromise proposal accompanied by an environmental impact study report and a statement of impact might have resulted in the lifting, in whole or in part, of the restrictions flowing from the rural zoning. To do this it would be necessary, at the very least, to provide some material or evidence as to some proposal which might thus have met with approval, for it would not be open to the Land Appeal Court to speculate at large as to such proposals.

The evidence before the Land Appeal Court which tended in favour of the prospect of rezoning was to the effect that an application for rezoning could have been approved subject to "conditions designed to recognise, protect and preserve the environment". That evidence was considered by the Land Appeal Court. That Court noted that the conditions envisaged included "larger than normal residential size allotments, limited building zones in terms of size and location to maximize distance of buildings from high water mark, absolute restriction of height of structures, establishment of easements over balance areas (not including building zones) restricting any structural or other above ground development or activity to provide buffer protection ... and consideration of enforceable covenants to regulate architectural treatment of beach-facing elevation of structures to minimize light and noise escape, restriction of pets and fenced enclosures to curtilages". By reference to these suggested conditions the Land Appeal Court expressed the view that "the most prudent action would be to limit human habitation on the resumed land to the minimum and that this would best be achieved by retaining the present rural zoning" and concluded that "(t)he probabilities against rezoning approval are of such order that ... the prudent purchaser would not add anything over and above the land's homesite value in expectation of a more liberal approach to rezoning or subdivision at some future date". That conclusion finds support in a decision of the Local Government Court upholding a refusal by the council to rezone a neighbouring parcel of land, known as the keys land, which lay further from the beach than the subject land. The decision of the Local Government Court gave great weight to the protection of the turtle rookery.

The Land Appeal Court considered the prospect of a compromise proposal by reference to the evidence before it. It was not required to do more. Accordingly, it did not fall into error of law in "accepting in the absence of the adoption of the procedures contemplated by s. 32A of (the Act) that there would inevitably have been a refusal of rezoning."

Finally, it is necessary to consider the argument that the Land Appeal Court erred by failing to give any account to "the uncontradicted assessment of value by Mr.. Weigh". The evidence of Mr.. Weigh was that the land "would ... have had great potential for development as a tourist resort" and that on that basis "the land to a developer would be worth say $1,000,000." Counsel for the respondents conceded that that development could have occurred only if the land had been appropriately rezoned and that a Residential A zoning would not permit of that development. Counsel also conceded that the claim for compensation was made on the basis of a potential rezoning to Residential A and that, unless it could be inferred from the evidence of Mr.. Weigh, there was no evidence as to the prospect of the land being rezoned to permit of development as a tourist resort. In these circumstances Mr. Weigh's evidence as to the value of the land to a developer could properly be taken into account only if it also disclosed evidence of a chance that the land might be rezoned to permit of that development.

At the time of giving his evidence Mr. Weigh was the Research and Regional Development Manager for the Queensland Tourist and Travel Corporation. His expertise was in resort development. He was not a town planner. Bearing in mind the nature of his expertise, Mr. Weigh's evidence cannot be read as in any way touching on the question whether the land might be rezoned to permit of development as a tourist resort. Rather, his evidence merely proceeded on an assumption that, had the land not been resumed, appropriate rezoning might have occurred. In these circumstances his evidence as to the value that the land would have had to a developer could not properly have been taken into account and the Land Appeal Court did not err in failing to do so.

As the Land Appeal Court did not err in respect of any of the matters by reference to which Counsel for the respondents sought to uphold the decision and order of the Full Court, the appeal must be allowed and the order of the Full Court set aside. As no error has been demonstrated on the part of the Land Appeal Court, it should be ordered, in lieu of the order of the Full Court, that the appeal to that Court be dismissed with costs.

Also found at [1991] 3 CLJ 1668